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No. 87-980

In The

Supreme Court of the United States

October Term, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.

MISSISSIPPI BAND OF CHOCTAW INDIANS,

Appellant,

vs.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,

Appellees.

On Appeal From The Supreme Court of Mississippi

NAVAJO NATION'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NAVAJO NATION, AMICUS CURIAE, IN SUPPORT OF APPELLANT

DONALD R. WHARTON
Counsel of Record
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Arizona 86515
(602) 871-6935

VIOLET A. P. LUI
Staff Attorney
Navajo Nation Department of Justice

Counsel for Navajo Nation

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NAVAJO NATION'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Navajo Nation moves this Court for leave to file this brief as Amicus Curiae in support of the Appellant, Mississippi Band of Choctaw Indians.

The Navajo Nation is a federally recognized tribe whose continuing relationship with the federal government was first formalized by the treaty signed on June 1, 1868 by General William T. Sherman for the United

States, and twenty-nine chiefs and headmen of the Navajo Nation. 15 Stat. 667.

There are questions of fact and law which have not been presented, nor are they likely to be adequately presented by the parties, but are relevant to the disposition of the case. The case presents issues the resolution of which is likely to have general application to all Indian tribes. The following are questions of particular concern to the Navajo Nation:

(1) Must state law be applied to determine domicile of an Indian child for purposes of Section 1911(a) of the ICWA if its application results in defeating the federal purposes of the Act? The Navajo Nation extends into three states. Many Navajos travel to or live for a time in these neighboring states and other states. Application of state law can result in many different results for Navajo cases arising under Section 1911(a).

(2) Is tribal law applicable under the Act in the foster or adoptive placement of Indian children outside of the reservation under state law? Appellant raised the issue of the applicability of section 1915(a) of the Act, involving the placement priorities for adoptions. However the Mississippi Supreme Court ignored the issue. Like many tribes, the Navajo Nation has its own laws, including custom, which identify the persons who have priority for custody and care of a child, when a parent cannot or will not keep a child. The ICWA at section 1915(c) requires the state court to follow the tribe's law for placement with consideration for the child's special needs. Parental preference is only entitled to

consideration. Section 1915(d) of the Act requires application of the social and cultural standards of the tribal community.

(3) Do parents who are tribal members have the right to defeat the tribe's exclusive jurisdiction over children by placing them outside the reservation under state law? The Navajo Nation makes children within its jurisdiction dependent if they are placed for care or adoption in violation of Navajo law, the ICWA or other federal law.

Respectfully submitted,

DONALD R. WHARTON
Navajo Nation Department
of Justice
Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (602) 871-6935

VIOLET A. P. LUI
Staff Attorney
Navajo Nation Department
of Justice

Counsel for Navajo Nation
Amicus Curiae

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AMICUS BRIEF OF THE NAVAJO NATION

The Navajo Nation files this amicus brief because the instant case involves a matter of great impact upon Indian tribes of the United States of America: the diminishment of their inherent power over internal domestic affairs.

NAVAJO NATION'S INTEREST AS AMICUS CURIAE

The Navajo Nation is a federally recognized Indian tribe, having received services from the federal government since the Treaty of 1868. 15 Stat. 667. The Navajo government has been described as "the most elaborate" among tribal governments. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201, 85 L.Ed.2d 200, 105 S.Ct. 1900 (1985).

All Indian tribes recognize how important their children are. Upon adopting a new Children's Code, Title 9, Chapter 11 of the Navajo Tribal Code [hereafter "N.T.C."] in 1985, the Navajo Tribal Council stated:

> [C]hildren of the Navajo Nation are its most important resource . . . ; . . . special, unique and traditional relationships within the Navajo nuclear family, the Navajo extended family and the Navajo clan system . . . provide strength to the Navajo child, and . . . must be protected and reinforced; . . . .

Navajo Tribal Council Res. CF-14-85 (Feb. 8, 1985).

Although not unique among the tribes in their attitudes toward their children, families and culture, the Navajo Nation has been very active in litigating cases under the Indian Child Welfare Act, 25 U.S.C. sections 1901-1963 [hereinafter the "ICWA" or "Act"]. Not all of the cases are as high profile as *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986) or *Matter of Adoption of Baby Girl Keetso*, No. A-9214 (Cal. Super. Ct. 1988). However, since *Halloway*, most of the Navajo cases under section 1911(a) have been transferred to the tribal courts almost as a matter of course. The *Baby Keetso* case was such an example; after argument the California court

agreed that the Navajo Nation had exclusive jurisdiction over the adoption proceeding because of the domicile of the Navajo mother.

The Mississippi Supreme Court's decision below undercuts the purposes of the Act and directly conflicts with established federal law respecting the inherent powers of tribal governments over their members and internal affairs.

SUMMARY OF ARGUMENT

I. Subject to federal power, the core of Indian sovereignty is the exclusive power of governance in the tribe over matters within the tribal territory and concerning the tribal members.

II. Establishment of a federal rule for the definition of domicile under section 1911(a) would prevent the balkanization of the ICWA.

III. Tribes and Indian parents have protected interests in their children. Individual tribal members cannot defeat a tribe's interest in its children.

ARGUMENT

I. Indian Sovereignty

Inherent Indian sovereignty necessarily includes the exclusive power to govern internal relations of tribal members. Indian tribal sovereignty is "the authority of Indian governments over their reservations" which the

Supreme Court has guarded consistently. *Williams v. Lee*, 358 U.S. 217, 223, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959). "State jurisdiction [. . .] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223. Examples of a tribe's inherent powers include: regulation of membership, domestic relations among tribal members, and inheritance. *United States v. Wheeler*, 435 U.S. 313, 322, n.18, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978).

The principle of exclusive jurisdiction of tribes over matters of domestic relations involving tribal members clearly confers on the Mississippi Choctaw Band the sole power to determine custody of B.B. and G.B.

II. Federal Law and the Application of Section 1911(a)

The federal power over Indian affairs is exclusively in the United States Congress and derives from the Indian Commerce Clause. U.S. Const., Art. 1, § 8, cl.3. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 170, n.6, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973). The Constitution gives any federal law with regard to Indians supremacy over any conflicting state law. U.S. Const. Art. VI, cl. 2.

Section 1911(a) of the federal Indian Child Welfare Act states, in part, that a tribe has jurisdiction exclusive as to any state over child custody proceedings involving Indian children who reside or are domiciled within the reservation of the tribe.

The Mississippi Supreme Court's decision in this case is contrary to section 1911(a), which legislatively confirmed pre-existing federal law recognizing and enforcing exclusive tribal jurisdiction when the Indian child resided

or was domiciled on the reservation. H.R. REP. No. 1386, 95th Cong., 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6530, 7540-41 [hereinafter "House Report"]. The House Report specifically cited *Wisconsin Band of Potowatomies v. Houston*, 393 F. Supp. 719 (D.W.D. Mich. 1973), as an example of the desired intent of the ICWA to support the tribes' exclusive jurisdiction.

In *Wisconsin Potowatomies*, the state probate court had assumed jurisdiction over the children because they were off the reservation at the time of their parents' death. The Potowatomie tribe had never given up its internal powers over its members. The court observed that, although a paternal Indian uncle had sought custody in the state court, the actions of an individual Indian "cannot create subject matter jurisdiction of Indian affairs in a state court". 393 F.Supp. at 733. Stating that if tribal sovereignty is to mean anything, it must include the right to provide for the care of its children within its boundaries, *Id.* at 730. The court held that the domicile of the children at the time the state court took jurisdiction was the dispositive issue. *Id.* at 732. Following the general rule, the court found that the children's domicile followed that of their parents on the reservation, and the domicile remained on the reservation although the parents died. *Id.* at 731-732.

In the instant case, the Mississippi Supreme Court interpreted its own case law when it concluded that the Choctaw children were domiciled at the place of their voluntary surrender by their mother. Although the state courts are the final authorities on the construction and interpretation of state law, *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), the purposes

and meaning of a federal law are not dependent on state law, unless Congress expressly so provides. *Jerome v. United States*, 318 U.S. 101, 104, 87 L.Ed. 640, 63 S.Ct. 483 (1943); *Popkin v. N.Y. St. Health & Mental Hygiene, etc.*, 547 F.2d 18 (2d Cir. 1976). State law cannot control the extent of a federal right so as to defeat the purposes of the federal act. *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 361, 96 L.Ed. 398, 72 S.Ct. 312 (1951) "[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Id.* "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply". *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 170-171, 36 L.Ed.2d 129, 93 S.Ct. 1257. *See*, also, *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976); *Bryan v. Itasca*, 426 U.S. 373, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976).

In a case decided after *Wisconsin Potowatomies*, but prior to enactment of the ICWA, this Court upheld the exclusive jurisdiction of the Northern Cheyenne Tribe over an adoption proceeding involving children and petitioners who were all tribal members. *Fisher v. District Court*, 424 U.S. 382, 47 L.Ed.2d 106, 96 S.Ct. 943 (1976). Whether state or tribal courts have jurisdiction over a dispute between Indians and non-Indians arising out of conduct on a reservation, in the absence of a governing federal law, depends on whether the state action infringed on the Indians' right of self-government on their reservations. 424 U.S. at 386. The Court specifically noted that to allow state jurisdiction over the adoption

would cause a substantial risk of conflicting adjudications on custody of Cheyenne children *and* a corresponding decline in the tribal court's authority. *Id.*, at 388. The Court stated that adoption proceedings are properly characterized as litigation arising on the reservation and "the jurisdiction of the Tribal Court is exclusive". *Id.*, at 389.

The ICWA is the governing federal law which requires the state courts to adhere to federal standards in child custody proceedings involving Indian children.

Domicile for purposes of the ICWA should not be construed under state laws, but rather under federal law, which includes relevant treaties, statutes and cases. Federal law recognizes tribal laws. *Williams v. Lee*, 358 U.S. 217. Interpretation of domicile based on federal and tribal law would accomplish the express intent of Congress to enforce tribes' exclusive powers in child custody proceedings involving reservation-domiciled children and would make it unnecessary for tribes to bear the heavy burden of litigation in the many, and often hostile, state forums.

The Mississippi Court held that, although the parents were reservation-domiciliaries, the children acquired domicile other than that of their Choctaw parents because they were born outside the reservation and the mother surrendered the children to Appellees outside the reservation. As a result, the court erroneously concluded that the ICWA did not apply. The court effectively denied the Choctaw Tribe of the right and the opportunity to assert its significant interests in adjudicating this case in the Choctaw court and, on behalf of the subject children, in enforcing the placement preferences of the ICWA.

Many tribes have their own laws regarding family and children. For example, the Mississippi Choctaw Band has its constitution and By-Laws (1975), and governmental legislation which cover their internal affairs. By this lawsuit the Mississippi Choctaw Band is enforcing its law, which is that they have exclusive jurisdiction over cases like this. Similarly, the Navajo Nation has several code sections dealing with family issues and children. Title 9 of the Navajo Tribal Code covers marriage, husband and wife, divorce, adoptions, guardians and children. The most recent revision to Title 9 is the Children's Code, amended 1985. In addition to the Code, Navajo case law covers many issues involving children.[1]

Although the state courts have jurisdiction under the Act over child custody proceedings involving Indian children domiciled outside the reservation, those courts must apply the ICWA to such proceedings. For reservation-domiciled children, however, section 1911(a) requires the application of federal and tribal law in order to give full effect to the purposes of the ICWA. Allowing the state courts to use state law to defeat the clear intent of section 1911(a) will result in inconsistent application of the Act throughout the United States. State invasion of this area of law would diminish the sovereignty of Indian tribes in direct contravention of established federal law. See, *U.S.*

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[1] Child support, custody, adoption, inheritance, jurisdiction, domicile, to name a few. *See, Navajo Reporter,* volumes 1-4 and compiled decisions from 1985 to the present, available through the Navajo Nation Bar Association, Post Office Drawer R, Window Rock, Arizona 86515.

v. Quiver, 241 U.S. 602, 35 S.Ct. 699, 60 L.Ed. 1196 (1916); *Fisher,* 424 U.S. 382, *Montana v. Blackfeet,* 471 U.S. 759; 85 L.Ed.2d 752, 105 S.Ct. 2399 (1985).

In the instant case, the Mississippi Supreme Court distorted the meaning of *Boyle v. Griffin,* 84 Miss. 41, 36 So. 141 (Miss. 1904), by ignoring the underlying rule of that case which is the same as the rule argued by the Choctaw Band: the domicile of children is that of their parents.

The history and impact of the ICWA are more fully discussed in the amicus briefs filed by the Native American Rights Fund and the Association of American Indian Tribes, Inc., on behalf of several tribes. It bears repeating here that the Act explicitly extends the right of a Tribe to participate in state court proceedings involving children of the Tribe. This is especially so when a case comes under section 1911(a). Limiting a tribe's right to intervene only in foster care or termination of parental rights proceedings is too narrow a reading of the Act, given the Congressional findings and statement of policy at 25 U.S.C. sections 1901 and 1902, respectively, and the legislative history.

Several courts have recognized a tribe's independent interest in its children, including one of the cases cited by the Mississippi Supreme Court, *Re J.R.S.,* 690 P.2d 10 (Alaska 1984). See, also, *Matter of Appeal in Maricopa County Juvenile Action No. A-25525,* 136 Ariz. 528, 667 P.2d 228 (1984). *Re J.R.S.* involved circumstances different from the instant case, except that the Alaska Supreme court explicitly recognized that a tribe has its own inter-

est in its children.[2] The court held that the tribe's right to intervene is covered by Rule 24 of the Alaska Rules of Civil Procedure on intervention as of right. Citing *Matter of Appeal in Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528, the court noted the tribe's central role in custody proceedings involving Indian children, and described the extensive influence that section 1915 of the Act gives to tribes in foster care placements, adoptions, and review of state records of state agency placements of Indian children. *J.R.S.*, 690 P.2d at 18.

The Alaska court should have noted, but did not, that section 1915(c) of the Act would allow a tribe to establish a different order of preference which the state courts would have to follow. The court also should have noted that section 1915(d) requires the state courts to apply the social and cultural standards of the Indian community where the parent or extended family resides or with which they maintain social and cultural ties in making the placements under section 1915. The court stated:

> [W]e conclude that the Village's interest is substantial and the alternatives to requiring intervention unacceptable. If Indian tribes are to protect the values Congress recognized when it enacted the Indian Child Welfare Act, tribes must be allowed to participate in hearings at which those values are significantly implicated.

690 P.2d at 15.

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[2] The Alaska Court incorrectly concluded that there is no tribal right of intervention under the ICWA in voluntary adoptions although acknowledging the extensive involvement of the tribes in all child custody proceedings under the Act.

While *J.R.S.* is a decision using state law to support the Indian tribe's rights under the Act, Alaska is only one among many forums which tribes must confront, with differing results.

Under the ruling of the Mississippi court, the Choctaw Tribe would never again have any jurisdiction over its children because all Mississippi Choctaw children are born in hospitals outside their reservation.

The impact upon all tribes is that the states will be able to use state law to divest tribes of inherent sovereignty in violation of Congress' express Act, if the decision below is not reversed by this Court.

III. Indian Parents and Tribes

The decision of the Mississippi court emphasized the parents' written consents and actions in turning over the child, implying that this somehow supported the state's exercise of jurisdiction and nullified the Act's application to the case. The implication is that the parents had a paramount right to use state power to place their children with the Holyfields and the tribe could not defeat that right.

It has been said that the family is not beyond the power of regulation in the public interest. *Prince v. Massachusetts*, 321 U.S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1943); reh. den. 321 U.S. 804, 88 L.Ed. 1090, 64 S.Ct. 784. The range of the government's power is wide when a child's welfare is affected. 321 U.S. at 167.

Adoption is one example of the areas in which government's power is taken for granted. Adoption was unknown at common law; it is a matter of statute. *Anguis*

v. Superior Court, 6 Ariz. App. 68, 429 P.2d 702 (1967). The states have adoption statutes, as do tribes such as the Mississippi Choctaw and the Navajo.

Congress enacted the ICWA based upon its Constitutional plenary power over Indian affairs. The Act had the effect of reaffirming exclusive tribal jurisdiction and divesting the purported power of the states when the adoption proceedings involve an Indian child, as defined in section 1903(4). The sections of the Act which directly affect adoptions are 1901-1903, 1911, 1913-1917. Under the Act the Indian parent's interests in the child sometimes conflict with that of the Tribe, *e.g.*, dependency proceedings, termination proceedings, transfer proceedings under section 1911(b), and voluntary adoptive placements of children by the Indian parents.

The concept of tribal power with regard to children is analogous to state power in relation to children within state jurisdiction. However, there are aspects of tribal membership and relations which make tribes quite different from states. See, *e.g.*, section 1901(5), referring to the essential tribal relations of Indian people and their different cultural and social standards. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978), included an extensive discussion of the tribes as distinct political communities. 436 U.S. at 55. In construing Title I of the Indian Civil Rights Act, 25 U.S.C. sections 1301-1303, [hereafter the "ICRA"] this Court noted that the ICRA modified the Bill of Rights under the U.S. Constitution "to fit the unique political, cultural, and economic needs of tribal governments". 436 U.S. at 62.

Similar to the way that tribes' interests and those of their members were provided for under the ICRA, Congress adopted the ICWA to protect both individuals and tribes. The ramifications of the Act, particularly section 1911(a), do not render the Act invalid under any theory of law, with regard to Indian parents' interests. Section 1911(a) merely confirms a rule of law already in force on most reservations. See, *e.g.*, 9 N.T.C. section 1055(d), providing for exclusive jurisdiction similar to section 1911(a) of the ICWA.

The ICWA protects the tribe's interest in its children and the children's right to be Indian. The Act recognizes that the tribal interest is distinct but on a parity with the interest of the parents. *Halloway*, 732 P.2d at 969.

Because this case is covered by section 1911(a), the issue of the parents' preference for placement is subject to the exclusive jurisdiction of the Tribe. *Williams v. Lee*, 358 U.S. 217, *Fisher*, 424 U.S. 382. The adoption proceeding can, accordingly, be heard in the Choctaw courts, where the parents and other interested parties will have ample opportunity to be heard.

Alternatively, even if section 1911(a) were not applicable to this case, the parents' preference for the Holyfields as adoptive parents only would be entitled to consideration where appropriate. 25 U.S.C. section 1915(c). The appropriateness of their preference could be evaluated only in light of the placement preferences of section 1915(a). Section 1915(a) must be complied with unless there is good cause. The Arizona Court of Appeals emphasized that the ties of an Indian child to the tribe are important, and the preferences for placement can only be

circumvented for good cause. *Matter of Appeal in Maricopa County*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983). Because of the relationship of tribes and their children, the ICWA designates the tribal court as the exclusive forum for custody and adoption of reservation-domiciled children, and the preferred forum for other Indian children. *Halloway*, 732 P.2d at 970. In the instant case the entire Act was simply ignored and the parental preferences were given much greater weight than the ICWA permits.

Under the facts of this case, enforcement of section 1911(a) does not result in any violation of a parental right, when all that will happen is that the adoption will be heard in the correct forum under Choctaw law. There is no authority holding that a parent has the right to avoid the tribal court and confer subject matter jurisdiction on the state court. *Wisconsin Potowatomies*, 393 F.Supp. 719.

The Choctaw Tribe has jurisdiction over adoptions of its children. Revised Constitution and By-laws of the Mississippi Band of Choctaw Indians, Article III, § 11-7-5 (1975). The actions of an individual tribal member domiciled on a reservation cannot confer subject matter jurisdiction upon the state court, and defeat the tribe's interest in the children. 393 F.Supp. at 733.

CONCLUSION

For the reasons stated in this brief, the Navajo Nation requests that this Court reverse the decision of the Mississippi Supreme Court and remand the matter for immediate transfer of the case to the Choctaw tribal court for further proceedings.

Respectfully submitted,

DONALD R. WHARTON
Assistant Attorney General
Navajo Nation Department
of Justice
Counsel of Record

VIOLET A. P. LUI
Attorney
Navajo Nation Department
of Justice
Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (602) 871-6935